

# **Venkareddy Chennareddy; Roger A. Carroll v. U.S. General Accounting Office**

**Docket No. 85-704-CA-86**

**Date of Decision: November 23, 1987**

**Cite as: Chennareddy, et al v. GAO (11/23/87)**

**Before: James, Chairman; Cappello, Kaplan, Kaufmann, and Weinstein, Members**

**Age Discrimination in Employment Act**

**Class Actions**

**Certification**

## **DECISION OF THE PAB**

This matter comes before the Board on a Petition for Review filed pursuant to the Board's procedures governing class action employment discrimination charges, 4 CFR Sec. 28.45. On December 8, 1986 the Comptroller General issued a Final Agency Decision rejecting the recommendation of the GAO independent Hearing Examiner that Petitioners' formal complaint of age discrimination be certified as a class action.

On December 19, 1986 Petitioners filed their Petition for Review appealing the Final Agency Decision.

On February 6, 1987 the Agency filed a response to the Petition for Review, asserting that the Petitioners' claims did not present sufficient evidence to support a finding that there is an identifiable class that has been discriminated against because of age. The Agency further asserted that Petitioners had not demonstrated that their claims are typical of the class they seek to represent, and that the Hearing Examiner's recommendation misapplied the standards governing class action certifications.<sup>1</sup>

After reviewing the preliminary submissions of the parties, we determined that the issues were sufficiently unclear that a decision could not be made on the state of the administrative record. Accordingly, we ordered an evidentiary hearing pursuant to Sec. 28.45(c) so that the record could be more fully developed. The parties conducted extensive discovery, and filed lengthy briefs on the issue of class certification. On August 14, 1987 we heard arguments on the motion for class certification. After careful consideration of the entire record developed by the parties, we now rule.

## **BACKGROUND**

Petitioner, Dr. Venkareddy Chennareddy, is a GS-13 Economist/Statistician with the GAO in a position classified as an evaluator-related position. Petitioner is 53 years old and seeks to represent

[T]hose employees of the General Accounting Office who were employees on or after March 15, 1986 who were, or are, employed in positions in GS grades 12, 13, 14, or 15, who had reached at least age 40 by March 15, 1986, and who had applied for advancement in position and/or were

considered qualified for advancement in position, and who were not selected by reason of their age.

Petitioner has moved for certification of this class, with himself as class agent,<sup>2</sup> pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Secs. 623a *et seq.*, and the GAO Personnel Act of 1980, P.L. 96-191, 94 Stat. 27. Petitioners allege that the GAO promotion system is manipulated by the GAO supervisors so as to create a "continuing pattern and practice" of promotion discrimination against older employees and in favor of "younger and (usually) lesser qualified and (almost always) less experienced persons."

GAO contends that the allegations presented in the complaint by Petitioners, and the subsequent submissions by counsel, do not satisfy the commonality and typicality requirements of Rule 23. Specifically, the Agency asserts that the record does not adequately identify a common basis upon which it can be concluded that there is a class that has been discriminated against because of age, nor is there sufficient demonstration that the claims of Petitioners are typical of the class they seek to represent. GAO further contends that all of Petitioners' claims relate to individual claims of age discrimination, and there are no specific factual assertions of Agency-wide discrimination necessary to even state a *prima facie* class action claim. Finally, the Agency asserts that Petitioners and their counsel fail to satisfy the adequacy of representation requirement of the Federal Rules of Civil Procedure, in terms of both the competence of counsel and the potential for conflict of interest between Petitioners and the class they seek to represent.

## ANALYSIS

In order to maintain a class action, the requirements of Rule 23 of the Federal Rules of Civil Procedure must be met. General Telephone Co. v. Falcon, 457 U.S. 147 (1982). This includes ADEA actions against the Federal Government. Moysey v. Andrus, 481 F.Supp. 850, 853 (D.D.C. 1979). Rule 23 provides these prerequisites: the class must be so numerous that joinder of all members is impracticable; there must be questions of law or fact common to all members of the class; the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and the representative parties must fairly and adequately represent the interests of the class. The representative action must meet *all* of the above prerequisites. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403-405 (1977). The class representative must be part of the same class and possess the same interests and suffer the same injury as the members of the class. *Id.* at 403. In determining the propriety of a class action, the critical question before us is not whether the Petitioners' case will succeed on the merits, but whether the requirements of Rule 23 are met. Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178 (1974),

We begin our analysis by considering whether the class which Petitioner Chennareddy purports to represent is so numerous that joinder of all members is impracticable. *See*, Federal Rules of Civil Procedure 23(a)(1). Petitioners have presented statistical evidence, which the Agency does not dispute, that fully half of the 3,000 or so persons employed at GAO in evaluator and evaluator-related positions in the GS-12 to -15 range are age 40 and over.

Although the sheer weight of numbers of the potential employees who are putative class members may be sufficient here to satisfy the numerosity requirement (*See, Stalling v. Califano*, 86 F.R.D. 140 (N.D. Ill. 1980)), we note that joinder of this class is also impracticable because of the existence of a large number of GAO offices dispersed across a geographic spectrum that includes three continents. Thus, we hold that the requirements of Rule 23(a)(1) are satisfied in this case.

In determining whether the Petitioners' claim meets the commonality requirement of Rule 23(a)(2), we must consider whether there are questions of law or fact common to the class. Petitioners premise their claim upon statistical adverse impact, alleging that, although half of the GAO employees in GS grades 12-15 are over 40 years of age, they receive less than 20% of the promotions at GAO in their respective grades. On the surface of this claim, there would appear to be common factual issues which predominate, chiefly, whether GAO has made decisions with respect to class members' employment based on the age of the class members. The legal issue is whether or not GAO's promotional system violates the class members' rights as guaranteed to them by the ADEA. However, Petitioner Chennareddy's individual claim, which gives rise to this litigation, is that in August 1986 Petitioner was not rated on the "Best Qualified" list for promotion to a GS-14 evaluator position. Petitioner's claim, then, is a disparate treatment claim that he was rejected from promotion consideration because of his age. In a disparate treatment case, proof of discriminatory motive or intent is essential. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n.15 (1977).

Petitioner offers no evidence that he was passed over for promotion in favor of less-deserving persons who are not protected by the ADEA. Even could Petitioner make such a showing, such evidence would not necessarily imply that this discriminatory treatment is typical of GAO's promotion practices, nor that GAO's promotion practices are motivated by a policy of age discrimination.

Another factor mitigating against satisfaction of the commonality requirement relates to Petitioners' statistical analyses. Petitioners' statistics do not reveal how many persons in the putative class have been denied promotion because they failed to make the "Best-Qualified" list. In fact, the statistics do not reveal how many persons over 40 applied for promotion, how many received promotions, how many persons over 40 receiving promotions competed only against other persons over 40 (versus how many persons under 40 receiving promotions competed only against other persons under 40), etc. Moreover, the record reveals that a substantial number of the promotion decisions were made by persons over 40, which fact also infers that there may be some conflict of interest within the class. See, Rowe v. Bailar, 26 FEP Cases 1145 (D.D.C. 1981). In sum, we do not find Petitioners' allegations susceptible to class treatment. Petitioner has offered no evidence of claims of other class members, and under the GAO system, we think "the issue of whether a particular job assignment or promotion denial was discriminatory would depend upon any number of factors peculiar to the individuals competing for the vacancy." (See, Patterson v. General Motors Corp., 631 F.2d 476 (7th Cir. 1980)), cert. denied, 451 U.S. 914 (1981). Included among these factors are level of education, length of service, time in grade, relevant experience for the position in question, GAO experience, etc. See Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1983).

The commonality and typicality requirements tend to merge, and they may be satisfied by demonstrating that there are other members of the class who have the same or similar grievances as the named plaintiff. General Telephone Co. v. Falcon, supra. However, this showing requires more than a conclusive allegation of discrimination against unnamed class members. Id. Here, Petitioner has offered no evidence to show that there are other persons in his age group who are aggrieved by the Agency's promotion practices. And while gross statistical disparities, as offered by Petitioner here, may of themselves offer a prima facie case of a pattern and practice of discrimination, Hazelwood School District v. United States, 433 U.S. 299 (1977), Petitioner has proffered no evidence which shows that he personally was a victim of age discrimination. In the personnel action which underlies the class complaint (the August 1986 selection for GS-14 Evaluator, for which position Petitioner Chennareddy did not make the "Best Qualified" certificate), Petitioner has not alleged that he was rejected for the position in favor of a similarly-situated

younger person not protected by the ADEA. See, Ricks v. Schlesinger, 24 E.P.D. 694 (D.D.C. 1979). Therefore, we cannot be certain that Petitioner has suffered the same injury as the class he seeks to represent. East Texas Motor Freight, 431 U.S. at 403. In fact, Petitioner's allegations in his administrative complaint, standing alone, are not sufficient to create an inference that age was a determining factor in the decision not to place him on the "Best Qualified" list. See, Cuddy v. Carmen, 762 F. 2d 119, 122 (D.C. Cir. 1985).

The failure of Petitioner to show an injury directly related to a wrong to the class not only impacts the commonality/typicality requirement, but also affects the adequacy of representation requirement of Rule 23 (a) (4). General Telephone Co. v. Falcon, 457 U.S. at 157 n.13. There is other evidence that Petitioner may not be an adequate class representative. As we mentioned earlier, there are potentially significant conflicts between members of the class, given the fact that many of the supervisors who make the selection decisions for vacant Evaluator and Evaluator-related positions are also members of the putative class, See General Telephone Co. v. EEOC, 446 U.S. 318, 331 (1980), and therefore, these same supervisors might well be competing with their subordinates for vacant positions. Falcon, supra, at n.13. Finally, Petitioners' pleadings lack clarity and precision. Not only is Petitioners' individual complaint vague, but Petitioners' brief in favor of class certification does not clearly spell out the facts in support of his position, and the brief is entirely devoid of any law which would direct us to certify this class.

We, therefore, find that Petitioners' complaint and attendant pleadings do not provide a sufficient basis for us to conclude that the adjudication of Petitioners' claim of promotion discrimination because of age would require the resolution of any common questions as to whether GAO discriminates in promotion against persons protected by the ADEA.

For the above reasons, we hold that Petitioners' claim cannot be certified as a class action, and Petitioners' Petition for Review is DISMISSED.

## Notes

1. The Agency's response to the Petition for Review also included two motions: 1) that, should the Board decide to reverse the Comptroller General's decision, then the matter be remanded to the Agency for further development of the record and reconsideration of the issue of class certification; and 2) that the Board stay any further proceedings on Petitioners' appeal until a decision is issued on the individual discrimination claims of Mr. Chennareddy, which were not then before the Board. Chennareddy's individual claims have since been decided by the Presiding Member.

2. Petitioner Roger Carroll is 48 years old, and a GS-13 Evaluator at GAO, who filed an individual complaint of discrimination which, rather than expressing specific allegations of discrimination, adopted Chennareddy's complaint by reference, stating: "I have experienced the same or similar situation as Chennareddy, and wish to be a co-agent or co-participant with Chennareddy." Obviously, any application of this decision would apply equally to Chennareddy and Carroll.